No. 417.

DEC 2 1901
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Brf. of Terrell for D. E.

No. 417.

Filed Dec 2, 1901.

ISADORE MINDER, PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA.

IN ERROR TO THE SUPERIOR COURT OF BIBB COUNTY, STATE OF GEORGIA.

BRIEF AND ARGUMENT OF

J. M. TERRELL,

COUNSEL FOR DEFENDANT IN ERROR.

THE FRANKLIN PRTG. & PUB. CO.
GEO. W. HARRISON, MANAGER
ATLANTA, GA.

Supreme Court of the United States.

OCTOBER TERM, 1901.

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ISADORE MINDER, PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA.

In Error to the Superior Court of Bibb County, State of Georgia.

BRIEF AND ARGUMENT

Of J. M. Terrell, Counsel for Defendant in Error.

STATEMENT OF FACTS.

At the November Term, 1900, of the Superior Court of Bibb County, Georgia, I. Minder was tried for the offense of murder, convicted therefor, and sentenced to death. A motion for new trial was made upon the ground, amongst others, that the court erred in refusing to continue the case on account of the absence of some material witnesses residing in the State of Alabama—it being shown to the court that the witnesses had been subpœnaed and refused to attend court, upon the advice

In Darmouth College Case, 4 Wheat. 518, Webster defined the phrase as follows: "By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

The fourteenth amendment did not create any *new* legal rights, but operated upon legal rights as it found them established, and declared that, such as they were in each State, they should be enjoyed by all persons alike. Ward *v.* Flood, 48 Cala. 36, 17 Am. Rep. 405.

The constitutional requirement of the fourteenth amendment is met if trial is had according to settled course of judicial procedure obtaining in state. What is due process of law in a State is determined by the law of that State. Walker *v.* Sauvinet, 92 U. S. 93. According to this case even trial by a jury in a State court is not insured by the fourteenth amendment. 92 U. S. 92.

"No more under the fourteenth article than previously can the Federal government interfere with the mode prescribed for the trial of State offenses; whatever is established will be due process of law, so that it be general and impartial in operation, and disregard no minor provision of Federal or State Constitution." 2 Story on Constitution (5th ed.) p. 695. And see Brannon on Fourteenth Amendment, pp. 107, 417, 418.

Fourteenth amendment was not designed to interfere with police power of States. Barbier *v.* Connally, 113 U. S. 31; Powell *v.* Pa., 127 U. S. 683. The fourteenth amendment does not limit the power of the State in the prosecution of criminals. *In re.* McKee, 19 Utah 241; *In re* Maxwell, 19 Utah 502.

An ordinance making it unlawful to sell lottery tickets is a police regulation and not repugnant to the constitutional requirement of due process of law, though it provides for arrest, summary punishment and sentence without trial by jury. State *v.* Dobard, 45 La. Ann. 1412, 14 So. 253.

Fourteenth amendment does not give right to indictment by grand jury in felony cases. 110 U. S. 538 (Hurtado *v.* Cala).

Fourteenth amendment does not limit States power over crimes except to guarantee equal justice. Leeper *v.* Texas, 139 U. S. 467, 468. Law in its regular course of administration through courts of justice is due process, and when secured by the law of the State, the constitutional requirement is satisfied; and due process of law is secured by laws operating on all persons alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. Ibid, 468.

The failure of the State of Georgia to provide compulsory process for witnesses beyond the limits of the State is not the fault of the law-making power in Georgia, but can only be charged to the failure of the Constitution of the United States, and of the Acts of Congress passed in pursuance thereof, to provide suitable means for the extradition of witnesses in somewhat the same manner as is provided for the extradition of fugutives from justice.

II.

The motion to continue the case in the Superior Court of Bibb county does not show that the Alabama witnesses were disposed to respect a commission issued by the Superior Court of Bibb county for the purpose of securing their answers to

interrogatories in the case against the plaintiff in error, nor that they would give their depositions in response to any order that might be passed by Bibb Superior Court looking to the securing of their depositions for such case, nor does it show that proper application was made to the Superior Court of Bibb county for an order allowing the evidence of such witnesses to be taken by interrogatories or depositions. Printed Record, pages 4 and 5. also pages 50 and 51.

In the case of McLain *v.* State of Georgia, 4 Ga. 438, the Supreme Court of Georgia left as an open question, to be determined whenever it should arise, whether the trial court could not under proper rules and restrictions, as such court in its discretion might adopt, allow the testimony of a witness residing beyond the jurisdiction of the State to be received in behalf of the defendant in a criminal case by interrogatories and commission.

The decision of the Supreme Court of Georgia in the case now under consideration still leaves open this question.

Until the plaintiff in error duly applies to the courts of Georgia for an order allowing testimony of the Alabama witnesses to be taken by interrogatories or depositions, and satisfies the court that such witnesses will in that manner give their testimony, he should not be heard to say that the laws of Georgia fail to provide him with means for obtaining the same.

In *ex parte* Harding, 120 U. S. 782, this court held that the denial of compulsory process to enable a person charged with crime to obtain witnesses at the trial in the court below, does not invalidate the judgment. It is true in that case that the right was not claimed under the 14th amendment, but under the 6th amendment to the Constitution, which gives to all per-

sons accused of crime the right to have compulsory process for obtaining witnesses in their behalf. This provision of the Federal Constitution is practically the same as that of paragraph 5, section 1, article 1 of the Georgia Constitution.

J. M. TERRELL,
For defendant in error.